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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

IN RE: RUTH ELLEN PEARCE

On Emergency Petition for Writ of Mandamus or Other Extraordinary Relief to the United States Court of Appeal for the Eleventh Circuit and to the Attorney General of the United States

EMERGENCY PETITION FOR WRIT OF MANDAMUS OR OTHER EXTRAORDINARY RELIEF AND BRIEF IN SUPPORT THEREOF

ANNE FLOWER CUMINGS
407 Sansome St., No. 300
San Francisco, CA 94108
Telephone: (415) 392-0250
Attorney for Petitioner

EPHRAIM MARGOLIN
NICHOLAS C. ARGUIMBAU
240 Stockton St., 3d fl.
San Francisco, CA 94108
Telephone: (415) 421-4347
Of Counsel

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED

I. WHETHER THIS COURT HAS JURISDICTION IN MANDAMUS TO REMEDY THE FAILURE OF THE ELEVENTH CIRCUIT TO ABIDE BY THE 30-DAY DEADLINE FOR DECIDING APPEALS OF ALLEGEDLY "RECALCITRANT WITNESSES." 28 U.S.C. § 1826(b).

II. WHETHER THE ELEVENTH CIRCUIT HAS ACTED ILLEGALLY AND IN EXCESS OF JURISDICTION IN FAILING EITHER TO DISPOSE OF PETITIONER'S APPEAL UNDER 28 U.S.C.§ 1826(b) WITHIN 30 DAYS OR TO RELEASE HER FROM INCARCERATION PENDING DECISION, IN VIOLATION OF PRACTICES ESTABLISHED BY ALL OTHER CIRCUITS WHICH HAVE ADDRESSED THE ISSUE.

III. WHAT REMEDIES ARE AVAILABLE TO MAKE PETITIONER WHOLE WHEN THE ELEVENTH CIRCUIT HAS FAILED EITHER TO ORDER HER RELEASE FROM INCARCERATION PEND ING APPEAL OR TO DISPOSE OF HER APPEAL WITHIN STATUTORY TIME LIMITS.

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LIST OF INTERESTED PERSONS

The following individuals and entities have an interest in this matter:

The United States Court of Appeals for the Eleventh Circuit:

The Hon. Peter T. Fay, Circuit Judge

The Hon. Robert S. Vance, Circuit Judge

The Hon. Phyllis A. Kravitch, Senior Circuit Judge.

The United States District Court for the Southern District of Florida:

The Hon. Edward B. Davis, District Judge.

The Attorney General of the United States

The Hon. William French Smith.

Ruth Ellen Pearce.

OPINIONS, ORDERS, AND JUDGMENTS BELOW

The opinions, orders, and judgments of which petitioner seeks review are set forth in the Appendix.

JURISDICTIONAL STATEMENT

Petitioner invokes the jurisdiction of this Court pursuant to the All Writs Act, 28 U.S.C. § 1651, and Rule 26, Supreme Court Rules.

STATUTES WHICH THE CASE INVOLVES

28 U.S.C. § 1651:

"Writs

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

28 U.S.C. § 1826:

"Recalcitrant witnesses

"(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of -

"(1) the court proceeding, or

"(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

"(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under

this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

STATEMENT OF THE CASE

Petitioner, RUTH ELLEN PEARCE, has been and remains incarcerated pursuant to an order dated March 15, 1984, of the District Court for the Southern District of Florida issued pursuant to 28 U.S.C. § 1826(a), holding her in contempt of the Federal Grand Jury for failure to answer certain questions, to be confined "until such time as she is willing to answer questions propounded by the Federal Grand Jury for a total period not to exceed the life of the said Federal Grand Jury, this is, until February 4, 1985 (Exhibit A to application for bail pending appeal filed in this Court on or about May 31, 1984).

Petitioner appealed from the order of the District Court pursuant to 28 U.S.C. § 1826(b), which provides

that any appeal from an order of confinement under 28 U.S.C. § 1826(a) must be disposed of within 30 days from the date of filing. Petitioner's appeal was filed March 23, 1984. Per order of the Court of Appeal for the Eleventh Circuit dated April 3, 1984, briefing was completed with the service and filing of the brief of the United States on April 17, 1984. On April 16, 1984, the Eleventh Circuit issued an order[1] stating:

> "IT IS ORDERED that the time within which this Court will dispose of this appeal on the merits, with full opinion if possible, or by Order with opinion to follow, is extended to and including May 22, 1984. See, In re: Tierney, 5 Cir. 1972, 465 F.2d 806-809."

Petitioner has four times applied for

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[1] The order, a copy of which is included in the Appendix as Exhibit 1, appears to be a form order which has been in use since May, 1982. See, lower right-hand corner of the order.

bail pending appeal:

(1) once to the District Court, which denied it on the grounds that "that would really sort of destroy the thrust of the awe here" (Exhibit B to May 3 bail motion in this Court);

(2) on April 26, 1984, to the Court of Appeals (unopposed but denied April 30, 1984, without explanation, Appendix Exhibit 2);

(3) before Circuit Justice Powell of this Court (May 3, 1984, denied without explanation May 10, 1984.)[2]

(4) on May 31, 1984, to the Court of Appeals after the Court's self-granted extension of time expired (never acted upon).

No further extensions of time to

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[2] The appellate briefs in the case were lodged with this Court in relation to the May 3 bail motion. The bail motions in the Eleventh Circuit are being simultaneously lodged in this Court.

act have been granted by the Court of Appeals, which has still, almost three months after filing of the appeal, neither disposed of the appeal nor released petitioner pending appeal.

The net effect of the above is that, despite having raised serious appellate issues which she submits mandate a reversal of her contempt conviction, and despite a clear and unambiguous statute requiring disposition of appeals in matters of civil contempt within 30 days, petitioner remains incarcerated and may remain incarcerated without any decision on her appeal until the end of the grand jury's term, approximately a year from the date of the District Court's contempt order.

SUMMARY OF ARGUMENT

28 U.S.C. § 1826(b) provides that appeals of alleged contemnors in matters of "recalcitrant witnesses" shall be decided within 30 days. All Circuits other than the Eleventh and Fifth which have considered the matter have determined that the statute requires either that the appeal be disposed of or that the appellant be released from custody as quickly as possible and under no circumstances in less than 30 days after filing the appeal. In the present case, appellant filed her appeal on March 23, 1984, but the Court of Appeals has refused either to order her release or to decide her appeal in the intervening three months. This is the most extreme example to date of an expanding practice in the Fifth and Eleventh Circuits in which § 1826(b) is treated as if it doesn't exist.

Mandamus is an appropriate

remedy to force the Eleventh Circuit to comply with the law in this case.

ARGUMENT

I. THIS IS AN APPROPRIATE CASE FOR EXERCISE OF THIS COURT'S MANDAMUS JURISDICTION.

As petitioner will argue further, infra, when the Court of Appeals failed to dispose of her appeal within 30 days, she became entitled either to summary reversal of the District Court's contempt order or to release pending appeal. She has received neither. Her ordinary remedy would be to await a decision of the Court of Appeals and seek relief in this Court thereafter by writ of certiorari if necessary. However, whether the Court of Appeals eventually sustains her appeal (which she submits that it must) or denies it, neither outcome will result in enforcement of the unambiguous language of 28 U.S.C. § 1826(b). Moreover, review after a decision might be rendered impossible on grounds of moot-

ness.

Consequently, the issuance by this Court of a peremptory writ of mandate, addressed to the Court of Appeals (the specific elements of which will be discussed under "Remedies," infra), is the only remedy adequate to protect the petitioner's rights under 28 U.S.C. § 1826(b). Moreover, it is essential to preserve this Court's authority as ultimate arbiter of controversies arising under the statute'[3] since the ordinary remedy would render the matter moot before this Court could dispose of it.

The writ of mandamus has a history in America as old and honorable as this Court. The writ will issue, as this

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[3] (cf. 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Emphasis added.)

Court said Marbury v. Madison, 1 Cranch 137, 168 (quoting 3 Blackstone's Commentaries 110) "to any person, corporation, or inferior court of judicature . . . requiring them to do some particular thing there specified, which appertains to their office and duty, and which the Court . . . has previously determined, or at least supposes, to be consonant to right and justice." Said this Court, "the very essence of civil liberty certainly consists of the right of any individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection" (Id. at 163). Because as will be more fully discussed below, the practice of the Fifth and Eleventh Circuits in consistently failing to decide contempt appeals in a timely fashion, cannot otherwise be remedied, the "protection of the laws" will be denied in those courts

unless this Court steps in.

II. ISSUANCE OF THE WRIT OF MANDAMUS TO CORRECT A PRACTICE OF THE ELEVENTH CIRCUIT IN THE FIELD OF CIVIL CONTEMPT WHICH IS IN CLEAR VIOLATION OF THE LAW AND TOTALLY AT LOGGERHEADS WITH THE CASES IN ALL OTHER CIRCUITS (EXCEPT THE FIFTH) WHICH HAVE ADDRESSED IT.

Despite the clear mandate of 28 U.S.C. § 1826(b) that appeals in cases of civil contempt for "recalcitrant witnesses" "shall" be disposed of within 30 days, the Eleventh and Fifth Circuits have adopted a practice which allows alleged contemnors to be incarcerated indefinitely without resolution of bona fide appeals. At first, that practice involved only de minimus violations of the 30-day rule. The first case appears to have been In re Tierney (5th Cir. 1972) 465 F.2d 806, in which on consolidated appeals of several "recalcitrant witnesses" the decision issued a few days after 30 days from the

appeal of the first witness to appeal, but within 30 days of the appeal of the last ones, 465 F.2d at 809.[4] The prejudice to the witnesses was further limited by this Court's subsequent order releasing the witnesses from incarceration pending resolution of a petition for certiorari.

In Beverly v. U.S. (5th Cir. 1972) 468 F.2d. 732, 742, the Court ordered itself a two-week extension on an unopposed request of the appealing contemnors, given that the short extension was "necessary to insure thorough consideration and an informed decision."

Subsequently, the Court of Appeals began habitually to grant itself extensions in the neighborhood of 30 days

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[4] In Tierney, this Court subsequently denied certiorari, 410 U.S. 914 (1973) but not before bail was granted on an order of Circuit Justice Douglas, after a denial by Justice Powell, Tierney v. U.S., 409 U.S. 1232, 1234 (1972). In the present case, as in Tierney, petitioner has applied for and been denied bail.

(e.g., In re Grand Jury Proceedings [1976] 532 F.2d 404, n. 3 at 406; U.S. v. Gravel [1979] 605 F.2d 750, n. 1 at 752; In re Dinnan [1980] 625 F.2d 1146, 1150.) This time, however, the Eleventh Circuit, relying on its earliest case of Tierney, has gone far beyond the limits of substantial compliance to allow itself, without a formal order extending time or consent of the appellant, a full three months in which it has not reached a decision. And its most recent order extending time, which expired on May 22, appears to have been a "boilerplate" form in use in such cases for at least two years. This blatant disregard for the clear language of § 1826(b) is unprecedented.

No other circuit similarly disregards the statutory mandate.

The most straightforward construction of § 1826(b) has been taken by the Tenth Circuit: that "the 30-day limi-

tation imposed by § 1826(b) is mandatory and may not be extended by any waiver, any stay, or release on personal recognizance." Matter of Berry (10th Cir. 1975) 521 F.2d 179, 181.[5] This is in accord with the legislative history, indicating that "disposition of the appeal is mandated as soon as practicable, but not more than 30 days from the filing" (House Report 91-1549, 1970 U.S.C. Congressional and Administrative News at 4022). On the other hand, such an inflexible rule leads to circumstances such as apparently occurred in the two Tenth Circuit cases, in which the Court of Appeals complies in form but not in substance by issuing a decision without adequate review of the

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[5] See also, In re Grand Jury Proceeding 82-2 (10th Cir. 1982), cert. denied, May 16, 1983, 103 S.Ct. 2087) 705 F.2d 1224, 1228, in which the Tenth Circuit cited a "purported" duty to decide an appeal within 30 days as the basis for not addressing the issues thoroughly.

record or the briefs.

This pragmatic consideration has led to the rule adopted by the majority of Circuits: that where necessary to insure thorough review the Court of Appeals may extend time for disposition beyond 30 days, but that the appellant must then be released pending decision.

The leading case is Melickian v. U.S. (8th Cir. 1977) 547 F.2d 416, 418-419. The Eighth Circuit, after (1) noting an "evident conflict in authority" on interpretation of § 1826(b) (547 F.2d at 418), (2) citing legislative history demonstrating a congressional intent "to protect the meritorious contemnors from extended incarceration" (id.), and (3) pointing out that a rigid construction of the statute would require in the event of a violation of the 30-day rule without release of the alleged contemnor, the contempt order to "be vacated and the

contemnor released from custody without receipt of the testimony which his incarceration was intended to furnish." (547 F.2d at 419), concluded as follows:

> "The statute calls for decision of a contemnor's appeal within thirty days and we intend to abide by that direction absent strong reasons for not doing so. We do feel, however, that when decision is impossible or unadvisable within the thirty-day period, the procedure followed by this Court which releases the contemnor pending disposition best reconciles the various interests bound up in the bail issue. The policy of the statute is upheld in that the contemnor is released until his appeal is decided. The court retains the necessary flexibility to assure a fair and complete consideration of the issues. Most importantly, the coercive pressure of the contempt order is not completely lost, even though the contemnor is released pending disposition, because the threat and the actuality of re-incarceration still loom on the horizon."

Courts other than the Eleventh and Fifth Circuits have generally followed the same course as the Eighth Circuit. See, In re Grand Jury Proceedings (2d Cir. 1982) 671 F.2d 690, 694; In re Weiss (2d Cir. 1983) 703 F.2d 653, n. 6 at 660; Matter of a Witness (7th Cir. 1983) 722 F.2d 349, 353, In re Federal Grand Jury Witness (9th Cir. 1979) 597 F.2d 1166, and In re Grand Jury Witness (9th Cir. 1982) 695 F.2d 359, n. 4

at 361.

This Court has recognized in the field of civil contempt

> "Congressional intent to safeguard Constitutional procedures by limiting courts, as Congress is limited in contempt cases, to 'the least possible power adequate to the end proposed.' 'The exercise by federal courts of any broader contempt power than this,' we have said, 'would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury.'" In re McConnell (1962) 370 U.S. 230, 234 (footnotes omitted); accord, Shillitani v. U.S. (1966) 384 U.S. 364, 371.

Consistent with this recognition that contempt's "drastic procedures" (McConnell, 370 U.S. at 234) must be used sparingly, Congress has provided in § 1826(b) that incarceration without appellate review is to be limited to 30 days.

The Eleventh Circuit has engaged in a consistent and expanding practice of flaunting this mandate, and petititioner asks that this Court put a stop to the

practice, once and for all.

III. THIS COURT SHOULD PROVIDE A REMEDY WHICH WILL MAKE PETITIONER WHOLE FOR THE WRONGS WHICH HAVE BEEN DONE HER.

Petitioner, according to the clear language of the statute and the weight of authority, was entitled to a decision or release from incarceration months ago. She could, therefore, request that this Court order the Court of Appeals forthwith either to release her pending decision or to decide her appeal. Under the authority of Melickian, supra, she can also request this Court order her unconditional release, the Court of Appeals and the District Court having lost jurisdiction over her contempt. Neither remedy, however, will altogether make her whole for the time which she has been illegally incarcerated pending appeal beyond 30 days. Because she could not be made whole by an order merely requiring prompt decision by the Court of Appeals, the within

petition will not be rendered moot if the Court of Appeals simply renders a decision pending decision by this Court. However, if this Court issues a writ requiring the Court of Appeals (1) to order petitioner's unconditional release or (2)(a) to decide the case or order release of petitioner from custody forthwith, (b) to reduce the maximum term which petitioner may serve by the number of days in excess of 30 she has served when the Court of Appeals finally acts, and (c) to reverse its decision denying bail pending appeal, petitioner will thereby be made whole.

Petitioner notes that part (b) of the second alternative remedy is analogous to a grant of "credit for time served," a concept which has been recognized previously in this area of civil contempt. See, United States v. Cassese (2d Cir. 1979) 622 F.2d 26, 28.

Petitioner further notes that

the Court of Appeals had a mandatory duty to grant bail on appeal for all reasons set forth in a previous bail motion addressed to Circuit Justice Powell (filed May 3, 1984) and therefore the writ lies to mandate granting of bail by the Eleventh Circuit.

CONCLUSIONS

For the above reasons, a writ should issue, either: (1) ordering the Court of Appeals to release petitioner unconditionally forthwith, or (2) ordering the Court of Appeals to release petitioner on bail pending appeal, to decide her appeal forthwith, and to order reduction of the amount of time she may be forced to serve by the time in excess of 30 days which she has been incarcerated without a

decision on her appeal.

Dated: June _____, 1984.

Respectfully submitted,

_____
ANNE FLOWER CUMINGS

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-5201

IN RE: RUTH ELLEN PEARCE, A Witness Before Federal Grand Jury,

Appellant.

Appeal from the United States District Court for the Southern District of Florida

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Before FAY, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the time within which this Court will dispose of this appeal on the merits, with full opinion if possible, or by Order with opinion to follow, is extended to and including May 22, 1984. See in re: Tierney, 5 Cir., 1972, 465 F. 2d 806-809.

FILED

APR 16 1984

SPENCER D. MERCER
CLERK

MOT-6H
(Rev. 5/82)

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-5201

In re: RUTH ELLEN PEARCE

A WITNESS BEFORE FEDERAL

GRAND JURY 83-8(MIA),

Appellant.

Appeal from the United States District Court for the Southern District of Florida

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BEFORE Fay, Vance and Kravitch, Circuit Judges

BY THE COURT:

IT IS ORDERED THAT appellant's motion for a stay of the order of confinement from which this appeal lies is DENIED.

IT IS FURTHER ORDERED THAT appellant's alternative motion for an order setting bail during the pendency of the appeal is DENIED.

FILED
APR 30 1984

Spencer D. Mercer
Clerk

MOT-6H
(Rev. 5/82)